Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-209

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
MICHAEL L. PAUP
Acting Assistant Attorney General
GILBERT S. ROTHENBERG
DAVID ENGLISH CARMACK
JOY L. PRITTS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a notice of deficiency mailed by the Internal Revenue Service to the taxpayer's last known address pursuant to Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212, but not received by the taxpayer due to Postal Service error, is sufficient to permit the assessment of taxes.

2. Whether the trial court's failure to give advance notice of its consolidation of the trial on the merits with the preliminary injunction proceeding constitutes reversible error when the taxpayer cannot demonstrate that he was prejudiced by the lack of notice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Abraham Zion Corp. v. *Lebow*, 761 F.2d 93 (2d Cir. 1985)	8
Air Line Pilots Ass'n, Int'l v. *Alaska Airlines, Inc.*, 898 F.2d 1393 (9th Cir. 1990)	8
Balkissoon v. *Commissioner*, 995 F.2d 525 (4th Cir. 1993)	6, 7
Berger v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969)	5
Berry v. *Bean*, 796 F.2d 713 (4th Cir. 1986)	8
Bright v. *Nunn*, 448 F.2d 245 (6th Cir. 1971)	8
Commissioner v. *Skapiro*, 424 U.S. 614 (1976)	4
Drummond v. *Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978)	7
Elias v. *Connett*, 908 F.2d 521 (9th Cir. 1990)	4
Gellman v. *Maryland*, 538 F.2d 603 (4th Cir. 1976)	9
Holly Sugar Corp. v. *Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564 (10th Cir. 1984)	7
Jones v. *United States*, 889 F.2d 1448 (5th Cir. 1989)	6
Keado v. *United States*, 853 F.2d 1209 (5th Cir. 1988)	5, 6
McPartlin v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981)	5, 6
Michenfelder v. *Sumner*, 860 F.2d 328 (9th Cir. 1988)	8
Morse v. *IRS*, 635 F.2d 701 (8th Cir. 1980)	5

Cases—Continued:

	Page
Penn v. *San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975)	8
Powell v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992)	5, 6
Rappaport v. *United States*, 583 F.2d 298 (7th Cir. 1978)	5
Reese Publishing Co. v. *Hampton Int'l Communications, Inc.*, 620 F.2d 7 (2d Cir. 1980)	7
Standard Oil Co. v. *Lopeno Gas Co.*, 240 F.2d 504 (5th Cir. 1957)	8
University of Texas v. *Camenisch*, 451 U.S. 390 (1981)	7
Williams v. *Commissioner*, 935 F.2d 1066 (9th Cir. 1991)	5

Statutes and rule:

Internal Revenue Code (26 U.S.C.):	
26 U.S.C. 6212	3, 4, 6
26 U.S.C. 6212(a)	4
26 U.S.C. 6212(b)(1)	3, 5, 6-7
26 U.S.C. 6213	2, 3, 4, 7
26 U.S.C. 6213(a)	2, 4
26 U.S.C. 7421(a)	2, 4
26 U.S.C. 7431	2, 7
Fed. R. Civ. P.:	
Rule 65	8, 9
Rule 65(a)(2)	7, 8

Miscellaneous:

11 C. Wright & A. Miller, *Federal Practice and Procedure* (1973)	7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-209

WILLIAM C. BLANKSTYN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is unpublished, but the decision is noted at 988 F.2d 117 (Table). The order entered by the district court (Pet. App. 15-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1993. The petition for rehearing was denied on May 12, 1993 (Pet. App. 13). The petition for a writ of certiorari was filed on August 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1990, the Internal Revenue Service (IRS) mailed petitioner a notice of deficiency for his 1985 income taxes. The notice advised petitioner that, since he had failed to file a return, the IRS had computed his tax liability for that year (Pet. App. 7). The notice was mailed by certified mail to petitioner's correct address. Petitioner did not receive the notice, however, and it was returned to the IRS as "unclaimed" (*id.* at 7, 17, 21).

The IRS thereafter sent a Final Notice and Demand (Notice of Intent to Levy) to petitioner informing him that an assessment had been made against him for his 1985 taxes and that, if he did not pay the assessed taxes, the IRS could levy upon his property. Following petitioner's failure to pay the assessment, the IRS levied on his wages (Pet. App. 16).

2. Petitioner filed a complaint in district court seeking an injunction to prohibit the IRS from levying on his property to collect his unpaid taxes. Section 6213 of the Internal Revenue Code provides a limited exception to the Anti-Injunction Act (26 U.S.C. 7421(a)) that permits a taxpayer to maintain a suit to enjoin the collection of taxes when a notice of deficiency has not been "mailed" to the taxpayer. 26 U.S.C. 6213(a).

Petitioner also sought damages pursuant to Section 7431 of the Code for an "unauthorized disclosure" of his tax return information. See 26 U.S.C. 7431. He claimed that the assessment of his taxes was procedurally improper (on the theory that the assessment was not filed in the Service's records) and that the disclosure of his return information in connection with the levy on his wages was therefore unauthorized (Pet. App. 3).

At a hearing on petitioner's request for a preliminary injunction, the government argued that the IRS had properly "mailed" the notice of deficiency and that the

exception to the Anti-Injunction Act provided in Section 6213 of the Code therefore did not apply (Pet. App. 6-7, 18-19). Upon completion of the hearing, the court issued a preliminary injunction effective for ten days and ordered supplemental briefing (Pet. App. 3). After the supplemental memoranda were filed, the court entered an order (i) consolidating and advancing the trial on the merits with the hearing on petitioner's request for preliminary injunction, (ii) treating the motion for preliminary injunction as a motion for permanent injunction, (iii) denying the injunction because it was barred by the Anti-Injunction Act, (iv) granting judgment for the United States, and (v) dismissing the action (Pet. App. 15, 25-26).

3. On appeal, petitioner contended that the notice of deficiency was invalid because he had not received it due to a purported error by the Postal Service. Petitioner claimed that his request for injunctive relief was therefore within the statutory exception to the Anti-Injunction Act contained in Section 6213 of the Code. The court of appeals rejected that assertion. The court found that petitioner's claim for injunctive relief was barred because the notice of deficiency was properly "mailed," even if petitioner did not receive it (Pet. App. 7). The court noted that a notice of deficiency is valid under Section 6212 if it is "mailed to the taxpayer at his last known address" (26 U.S.C. 6212(b)(1)), even if it is never received by the taxpayer (Pet. App. 7). The court further held that petitioner was not entitled to injunctive relief under the judicial exception to the Anti-Injunction Act because (i) he failed to establish that "under no circumstances could the government prevail" and (ii) he has an adequate remedy at law since "he can pay the tax and file an action for refund" (Pet. App. 8).

The court concluded, however, that the district court had erred in dismissing petitioner's wrongful disclosure claim. The court therefore remanded the case to the dis-

trict court for further consideration of that claim (Pet. App. 8-11). The court reasoned that an issue of fact remained to be resolved as to whether the assessment was properly recorded and whether "the underlying assessment and lien were invalid and, therefore, the release of return information was unlawful" (*id.* at 9).

ARGUMENT

1. a. The Anti-Injunction Act prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax" (26 U.S.C. 7421(a)). Section 6213 of the Code, however, provides a limited exception to the Anti-Injunction Act and allows a taxpayer to maintain an action to enjoin the collection of tax when a notice of deficiency has not been "mailed" to the taxpayer pursuant to Section 6212. See 26 U.S.C. 6213(a).[1] See *Commissioner* v. *Shapiro*, 424 U.S. 614, 616-617 (1976); *Elias* v. *Connett*, 908 F.2d 521, 523 (9th Cir. 1990). Section 6212 of the Code provides that a notice of deficiency may be sent to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). To provide a uniform and predictable method for issuing these notices, Congress further specified in Section 6212 that a notice,

[1] Section 6213 provides in relevant part as follows (26 U.S.C. 6213(a)):

> Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed * * * the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * * [N]o assessment of a deficiency in respect of any [income tax] * * * and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer * * *. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court.

"if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)).

Applying the plain language of this statute, the courts of appeals have generally held that a notice of deficiency properly mailed to the taxpayer's last known address by certified or registered mail is valid without regard to whether the taxpayer actually received it. *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988); *Morse* v. *IRS*, 635 F.2d 701, 703 (8th Cir. 1980); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also *Berger* v. *Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969). Applying this authority, the court of appeals properly rejected petitioner's claim in this case. The uncontroverted evidence demonstrated that the IRS mailed the notice of deficiency to petitioner by certified mail, properly addressed to his last known, and correct, address (Pet. App. 6-7).

b. Petitioner asserts (Pet. 14-15) that he did not receive the notice of deficiency because it was mishandled by the Postal Service.[2] He claims that, under decisions in other circuits, the notice of deficiency was therefore invalid. Pet. 15, citing *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir. 1992), cert. denied, 113 S. Ct. 440 (1992), and *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981).

In *McPartlin*, the court stated that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayer due to error of the Postal Service, the notice shall be found insufficient." 653 F.2d at 1191. As other courts have recognized, however, that statement was dictum because the court concluded in *McPartlin* that the IRS had *not* sent the notice of deficiency to the

[2] The district court, however, made no such finding.

taxpayer's "last known address" as required by Section 6212 (653 F.2d at 1187, 1190). See *Keado* v. *United States*, 853 F.2d at 1212 n.9. As we acknowledged in the government's petition for a writ of certiorari in the *Powell* case (92-452 Pet. at 11 n.12), the decision in *McPartlin* thus does not afford a basis for concluding that a conflict among the circuits exists on this issue.

It is true that the Fourth Circuit stated in *Powell* v. *Commissioner* that if "the notice was admittedly not delivered to the taxpayers because of an error of the Postal Service * * * that is sufficient proof on the part of the taxpayers * * * that the notice was insufficient." 958 F.2d at 56. It is no longer clear, however, that *Powell* is accepted as a correct statement of the law in that circuit. In *Balkissoon* v. *Commissioner*, 995 F.2d 525 (1993), the Fourth Circuit endorsed the generally accepted rule that a notice of deficiency is "sufficient" if it is mailed to the taxpayer's last known address (*id.* at 528):

> Section 6212(a) does not require that the taxpayer actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address.

The court emphasized that this "statutory scheme . . . provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer." *Ibid.*, quoting *Jones* v. *United States*, 889 F.2d 1448, 1450 (5th Cir. 1989). Even though *Powell* was cited to the court in the *Balkissoon* case (see 995 F.2d at 528), the Fourth Circuit applied the generally accepted rule that a notice of deficiency is sufficient if it is "mailed to the taxpayer at his last known address" (26

U.S.C. 6212(b)(1)) even if the taxpayer did not "actually receive" it. 995 F.2d at 528.

2. Petitioner contends (Pet. 19-22) that the district court erred by failing to give advance notice of the consolidation of the trial on the merits with the preliminary injunction proceeding.[3] Rule 65(a)(2) of the Federal Rules of Civil Procedure specifically provides, however, that, "[*b*]*efore or after the commencement of the hearing* of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2) (emphasis added). The Rule thus authorizes the trial court, on its own motion, to transform a preliminary injunction hearing into a final hearing on the merits of the claim at any time. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2950, at 486 (1973). See *Holly Sugar Corp.* v. *Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564 (10th Cir. 1984); *Reese Publishing Co.* v. *Hampton Int'l Communications, Inc.*, 620 F.2d 7 (2d Cir. 1980); *Drummond* v. *Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Although "courts have commonly required" that advance notice be given of a consolidation of the trial on the merits with the preliminary injunction proceeding (*University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981)), neither this Court nor the courts of appeals have held that such advance notice is required in every instance. Instead, advance notice of consolidation under

[3] Petitioner's complaint sought both injunctive relief under Section 6213 and damages for an "unauthorized disclosure" under Section 7431. The court of appeals remanded the case for further consideration of petitioner's damage action under Section 7431. The consolidation issue addressed in this part of the petition concerns only petitioner's request for a permanent injunction.

Rule 65(a)(2) is required only when failure to do so would prejudice one of the parties by precluding that party from presenting evidence that could have changed the outcome of the case.[4] See *Michenfelder* v. *Sumner*, 860 F.2d 328, 337 (9th Cir. 1988) (party not prejudiced by lack of notice where he could not show that additional evidence could have altered the outcome of the case); *Berry* v. *Bean*, 796 F.2d 713, 719 (4th Cir. 1986) (dismissal on merits without advance notice of consolidation appropriate where plaintiffs could not offer any evidence that would change the outcome of the case); *Abraham Zion Corp.* v. *Lebow*, 761 F.2d 93, 101 (2d Cir. 1985) (the district court's "order of consolidation will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence"). See also *Bright* v. *Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (dismissal on merits at end of preliminary injunction hearing permissible where plaintiff shows no right to relief); *Standard Oil Co.* v. *Lopeno Gas Co.*, 240 F.2d 504, 510 (5th Cir. 1957).

The cases relied upon by petitioner are not to the contrary. In those decisions, the courts determined that the aggrieved party was prejudiced because he could have adduced additional material evidence. See *Air Line Pilots Ass'n, Int'l* v. *Alaska Airlines, Inc.*, 898 F.2d 1393 (9th Cir. 1990) (consolidation and determination on merits under Rule 65 was improper where factual issues required further discovery); *Penn* v. *San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975) (dismissal of a claim for permanent injunction without consolidation and notice was improper because plaintiffs had additional

---

[4] Petitioner appears to concede that this is the proper standard, for he requests further review of this issue only in the event the Court were to determine that Postal Service error would defeat an otherwise proper notice of deficiency. See Pet. 22-23.

material evidence that was not presented at the preliminary injunction hearing); *Gellman* v. *Maryland*, 538 F.2d 603 (4th Cir. 1976) (consolidation under Rule 65 without notice was an abuse of discretion where it appeared that additional evidence may have been relevant to the cause of action). The decisions of the lower courts in this case do not conflict with these legal principles.

Petitioner asserts that advance notice was required in this case so that he could present additional evidence that he did not receive the notice of deficiency because of Postal Service mishandling (Pet. 22-23). As the court of appeals properly determined, however, the sufficiency of a notice of deficiency is determined solely by whether the IRS properly sent the notice to the taxpayer's last known address (Pet. App. 7). The underlying reasons for petitioner's failure to receive the notice, after it was properly mailed by the IRS, are therefore not relevant to his claim for injunctive relief. Because petitioner's claim was properly disposed of on these legal grounds, he can establish no prejudice from the consolidation of the case under Rule 65 without prior notice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
DAVID ENGLISH CARMACK
JOY L. PRITTS
Attorneys

OCTOBER 1993